In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 689

LOUIS S. WEINER, *Petitioner*

v.

RECONSTRUCTION FINANCE CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the referee in bankruptcy and of the District Court for the Southern District of New York (R. 52-61; 68-71) are not reported. The opinion of the Court of Appeals for the Second Circuit (R. 79-85) is reported at 192 F. 2d 760.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 7, 1951 (R. 86-87). On February 4, 1952, Mr. Justice

Jackson extended the time for filing a petition for certiorari to and including April 5, 1952 (R. 89). The petition was filed on April 5, 1952. The jurisdiction of this Court is invoked under 11 U.S.C. 47(c) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below correctly interpreted New Jersey law in refusing to nullify certain New York chattel mortgages, where the property covered by those mortgages was removed to New Jersey with the mortgagee's consent and where the mortgagee did not re-file the mortgages in New Jersey, there being no statute in that state authorizing recordation of foreign chattel mortgages.

STATUTE INVOLVED

The only statute in New Jersey authorizing recordation of chattel mortgages (New Jersey Statutes Annotated, Title 46, Chapter 28, Sections 5 and 7) provides in pertinent part:

> Sec. 5. "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers

and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation, made and subscribed by the holder of such mortgage, his agent or attorney, stating the consideration of such mortgage and, as nearly as possible, the amount due and to become due thereon, be recorded by section 46:28-7 of this title."

Sec. 7. "Every instrument mentioned in section 46:28-5 of this title shall be recorded, in suitable books provided for that purpose, in the office of the county recording officer of the county where the property so mortgaged shall be at the time of the execution of such instrument; * * * ."

STATEMENT

This action arises out of an attempt by petitioner, as trustee in bankruptcy of the Daunt Corporation, to set aside certain chattel mortgages given by the bankrupt to respondent to secure a loan.

On April 1, 1946, respondent loaned $50,000 to the Daunt Corporation, which executed and delivered to respondent on the same day a chattel mortgage as security for the loan (R. 7). At that time Daunt had its principal place of business in Brooklyn, New York and the mortgage covered all

of its fixtures, machinery and equipment there located (R. 19). This mortgage was filed and recorded in Brooklyn on the same day it was executed. (R. 19). Later in 1946 and in 1947, Daunt gave respondent supplemental chattel mortgages on additional machinery and equipment it acquired in Brooklyn and in Queens County, New York (R. 20). These supplemental mortgages were also promptly filed for record in the appropriate New York counties[1] (R. 20).

Between May and September, 1948, and after purchasing a factory in Trenton, New Jersey, Daunt, with respondent's knowledge and consent, removed all of its fixtures, machinery and equipment to that city (R. 20-21, 54). The New York chattel mortgages, covering this property, were not re-recorded in New Jersey (R. 21). On November 22, 1948, however, Daunt gave respondent an additional chattel mortgage on all of its personal property in New Jersey (R. 21). This mortgage was recorded in New Jersey on Novem-

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[1] The execution date and the date and place of filing of these supplemental mortgages are shown by the following schedule:

Date of Execution	Date of Filing	County of Filing
June 6, 1946	June 11, 1946	Kings
Aug. 9, 1946	Aug. 9, 1946	Kings
Jan. 30, 1947	Feb. 4, 1947	Kings
	Feb. 4, 1947	Queens
May 28, 1947	June 4, 1947	Kings
	June 4, 1947	Queens

ber 22, 1948, and covered the same property which had been removed from New York and which was already covered by the New York mortgages (R. 21).

On November 24, 1948, Daunt filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York (R. 52). It was allowed to operate its business under court order as a debtor in possession until June 15, 1949, when the petition for arrangement was dismissed and Daunt was adjudged a bankrupt (R. 52-53).

Petitioner, the trustee in bankruptcy for Daunt, then moved for an order declaring the chattel mortgages held by respondent null and void as against the bankrupt's estate (R. 31-40). Respondent's motion to dismiss for failure to state a claim on which relief could be granted was denied by the referee in bankruptcy, who ruled that respondent's failure to refile the New York mortgages in New Jersey invalidated them as to the trustee in bankruptcy (R. 56).[2] The referee's action was affirmed by the district court (R. 68-71).

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[2] The referee and both courts below did not rule on the effect of the New Jersey mortgage of November 22, 1948, which had been attacked as an attempted preference "in violation of Section 60a and b of the Bankruptcy Act." (R. 37). No question concerning that mortgage is raised by petitioner here.

On appeal, the court below ruled that respondent's consent to the removal of the property to New Jersey did not impair the validity of the New York mortgages and that their validity would be "recognized under New Jersey law." (R. 85). It accordingly reversed the district court judgment with directions to dismiss the trustee's motion to set aside the mortgages (R. 86).

ARGUMENT

The only issue in this case is whether the court below correctly held that the lien of a chattel mortgage properly recorded according to the laws of New York, where it was executed and where the property was then located, is not lost by removal of the property to New Jersey with the mortgagee's consent. Petitioner recognizes that New Jersey law is controlling and that the holding of the court below was based on New Jersey law (Pet. 7).[3] But he seeks review here on the ground that the court below misinterpreted New Jersey law and relied on New Jersey cases which were not "decisions of the highest court of New Jersey" (Pet. 8).

The question presented is therefore one of local law having no general importance; the decision of

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[3] Since New Jersey law controls here, petitioner's assertion that the decision below conflicts with *United Const. Co.* v. *Milam*, 124 F. 2d 670 (C.A. 6), which was based on Kentucky law, and with *Robbins* v. *Bostian*, 138 F. 2d 622 (C.A. 8), which was based on Nebraska law, is incorrect.

the court below correctly interpreted the applicable New Jersey law and properly relied on decisions of intermediate courts of that state. Accordingly, further review by this Court is not, we submit, warranted.

1. Under the prevailing rule, as set forth in the Restatement, the chattel mortgagee does not forfeit his lien by consenting to the removal of the property to another state unless that state requires him to re-file the chattel mortgage and he fails to do so. Restatement, Conflict of Laws, Section 270; Goodrich, *Handbook of the Conflict of Laws* (2d Ed. 1938), pp. 418, 420. Thus, as observed by the court below, the effect of the removal of the property to New Jersey in this case "depended on the law of the State of New Jersey." (R. 84). The effect of the removal depended, in other words, on whether New Jersey law conditioned the validity of foreign chattel mortgages on re-recordation in New Jersey.

The court below properly found that New Jersey law imposed no such condition. While the New Jersey chattel mortgage recordation statute voids unrecorded mortgages, there is no doubt that it applies only to chattel mortgages executed on property in New Jersey. *Parr* v. *Brady*, 37 N.J.L. 201. The express terms of the statute require recordation of a chattel mortgage in the appropriate New Jersey "county where the property so mortgaged" was located "at the time of

the execution of such instrument." New Jersey Statutes Annotated, Title 46, ch. 28, Sec. 7; *supra*, p. 3. If the property was originally located and mortgaged in another state where the mortgage was properly recorded, "there is no statute in New Jersey" which requires or even authorizes refiling of that mortgage upon removal of the property to New Jersey (R. 84); *Parr* v. *Brady*, 37 N.J.L. 201; *Mygirack* v. *Lepore*, 6 N.J. Sup. 505; see also *Marvin Safe Co.* v. *Norton*, 48 N.J.L. 410; *Lane* v. *J. E. Roach's Banda Mexicana Co.*, 78 N.J. Eq. 439.[4]

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[4] All of the four cited New Jersey cases recognize that removal of the property to New Jersey does not destroy the rights of a chattel mortgagee or conditional vendor. Petitioner attempts to distinguish the *Parr* case on the ground that it involved a removal without the consent of the mortgagee (Pet. 8). No similar distinction is attempted by petitioner with respect to the *Marvin Safe Co.* case, where the facts clearly show that consent was obtained before removal of the property to New Jersey. Moreover, even in the *Parr* case, while the initial removal was made without the mortgagee's consent, the facts show that he later learned of the removal. Knowledge of the removal, as pointed out in one of the cases relied on by petitioner, "is equivalent to consent." *United Const. Co.* v. *Milam*, 124 F. 2d 670, 671 (C.A. 6).

The significant factor here is that since New Jersey law does not permit recordation of foreign chattel mortgages, the mortgagee is unable to record such a mortgage even where he consents to the removal or later learns of it. For that reason, it is "by the better view, immaterial that the mortgaged property has been taken to the second state with the mortgagee's consent" (R. 83); Goodrich, *Handbook of the Conflict of Laws* (2d Ed. 1938) p. 418; Jones, *Chattel Mortgages and Conditional Sale*, (Bowers Ed. 1933), section 260c.

2. Petitioner's other contention is that none of the four cited New Jersey cases "are decisions of the highest court of New Jersey and for this reason" should not have been followed by the court below (Pet 8). It must be noted, however, that two of the cases—the *Parr* and *Marvin Safe Company* cases—are decisions of the New Jersey Supreme Court, which is now the court of last resort in New Jersey. N.J. Constitution, Art. 6, Sec. 2, par. 2. It is true that when the *Parr* and *Marvin Safe Company* cases were handed down, these decisions were subject to review by the New Jersey Court of Errors and Appeals. But even at that time, the Supreme Court was an intermediate appellate court whose decisions, if not overturned by the higher court, were fully binding on all other courts. *Makohon* v. *Millers Nat. Ins. Co.*, 12 N.J. Misc. 282.

The determinations of such an intermediate state court, in the absence of a decision by the highest state court, should be respected by a federal court seeking to apply the law of that state. *Fidelity Trust Co.* v. *Field,* 311 U.S. 169, 177; *West* v. *A. T. & T. Co.,* 311 U.S. 223, 236. The court below properly relied on the decisions of the intermediate New Jersey courts.

CONCLUSION

The decision below is correct and presents no conflict with applicable state law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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